

Supreme Court, U. S.
FILED

In The

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-814

EDDIE THOMPSON, JR.,

Plaintiff-Petitioner,

v.

COVINGTON HOUSING DEVELOPMENT
CORPORATION,
JOSEPH CONDIT

and

JUNE HEDRICK,

Defendants-Respondents.

**BRIEF OF RESPONDENTS IN RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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Joseph Condit
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I hereby certify that 3 copies of the foregoing Brief of Respondents in Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit has been served by United States Mail upon Mr. Eddie Thompson, Jr., Pro Se, 736 Highland Avenue, Covington, Kentucky 41011, this 13th day of December, 1978.

Charles P. Wagner

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STATEMENT OF THE CASE

The Petitioner, Eddie Thompson, Jr., commenced this action in the United States District Court for the Eastern District of Kentucky on September 28, 1977 against Covington Housing Development Corporation, Joseph Condit and June Hedrick.

Joseph Condit and June Hedrick filed their answer and subsequently filed several motions to dismiss the complaint. The District Court on October 5, 1977 dismissed the action as to Joseph Condit and June Hedrick, but retained the case on the docket as to the remaining Defendant, Covington Housing Development Corporation. (App. 1a-2a)

Eddie Thompson, Jr., in essence, moved the Court to certify the question of law so that he could appeal. Joseph Condit and June Hedrick interposed no objection to this motion, as at some point in time Eddie Thompson, Jr. was going to appeal. There was no objection to the appeal being sooner rather than later. The District Court overruled the motion and did suggest orally in open court that the remaining Defendant, Covington Housing Development Corporation, could be dismissed as a Defendant, thereby finalizing the matter.

Eddie Thompson, Jr. did not heed the advice of the District Court and did not proceed against the remaining Defendant so as to finalize the action, but rather filed an appeal to the United States Court of Appeals for the Sixth Circuit.

The United States Court of Appeals for the Sixth Circuit, on its own initiative, entered an order on September 18, 1978, dismissing the appeal on the basis that there was no final appealable order and there was no jurisdiction to consider the appeal. (App. 8a-9a) This action put the matter back into the District Court but Eddie Thompson, Jr., instead, petitioned for a Writ of Certiorari.

ISSUE

The correct issue involved in this present proceeding is:

- I) There was no final appealable order to give the United States Court of Appeals for the Sixth Circuit jurisdiction to hear and rule upon the appeal.

ARGUMENT

The Petition for a Writ of Certiorari should be denied for the reason that:

- I) There was no final appealable order to give the United States Court of Appeals for the Sixth Circuit jurisdiction to hear and rule upon the Appeal.

The District Court in its memorandum and order of October 5, 1977 dismissed two of three named Defendants. The District Court specifically retained the case on the docket as to the Defendant, Covington Housing Development Corporation.

The District Court did not make an express determination under Rule 54 (b), or a certification under 28 U.S.C. § 1292 (b) so that an appeal could be taken.

Since there was no final appealable order, the United States Court of Appeals for the Sixth Circuit had no jurisdiction to consider the appeal of the Petitioner. *William B. Tanner Co., Inc. v. United States*, 575 F 2d 101 (6th Cir. 1978); *Moody v. Kapica*, 548 F 2d 133 (6th Cir. 1976). Consequently, the dismissal of the appeal was proper. The right of the Petitioner to an appeal on the merits is still present. This put the matter back into the District Court where the Petitioner has the opportunity to pursue his case to finalization. The right of the Petitioner to an appeal on the merits is still present after the case has been finalized in the District Court.

CONCLUSION

The Petition and the Record does not show that there are any reasons for a Writ of Certiorari to be issued for the review of this case pursuant to Rule 19(1) of the Rules of the Supreme Court of the United States.

Respectfully submitted,

CHARLES P. WAGNER

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Attorney for Respondents,
Joseph Condit and
June Hedrick

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CIVIL ACTION NO. 77-35

EDDIE THOMPSON, JR.,

PLAINTIFF,

vs.

**COVINGTON HOUSING DEVELOPMENT
CORPORATION, ET AL.,**

DEFENDANTS.

ORDER

(Filed October 5, 1977)

In accordance with the Memorandum Opinion of even date, it is

ORDERED AS FOLLOWS:

1. The defendants', Condit's and Hedrick's, motion to dismiss this action as barred by the statute of limitations is hereby sustained as to the plaintiff's causes of action under 42 U.S.C. §§ 1985 and 1986, and overruled as to the plaintiff's claim under 42 USC §§ 1981 and 1983.

1. The defendants' Condit's and Hedrick's, motion to dismiss this action on the basis of *res judicata* is hereby sustained.

3. This case be and is dismissed as to the defendants, Condit and Hedrick, but shall remain on the docket as of the remaining defendant, Covington Housing Development Corporation.

This 5 day of October, 1977.

/s/ EUGENE E. SILER, JR.,
JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

—
CIVIL ACTION NO. 77-35
—

EDDIE THOMPSON, JR.,
PLAINTIFF,

vs.

COVINGTON HOUSING DEVELOPMENT
CORPORATION, ET AL.,
DEFENDANTS.

—
MEMORANDUM OPINION

(Filed October 5, 1977)

This civil rights action was insigated by the plaintiff, Eddie Thompson, Jr., pro se, alleging a conspiracy to deprive him and others of wages due and to deprive him or his job as director of the defendant, Covington Housing Development Board. The matter is before the Court now on motions by defendants, Joseph Condit and June Hedrick, to dismiss this action. Defendants base their motions on the grounds that the Court lacks jurisdiction to hear the case and that the action is barred by the doctrine of *res judicata* and the statute of limitations. Additionally, defendants request that the Court dismiss the suit as a class action and strike certain portions of the complaint which refers to the class plaintiff purports to represent. These issues will be considered separately.

CLASS ACTION

The plaintiff argues that the facts and questions in this suit are common to all members of the class. However, the "class" consists of but four people, the plaintiff and three other former employees of the corporation, all of whom are readily identifiable. The Court cannot find that the proposed "class is so numerous that joinder of all members is impracticable." FED.R.CIV.P. 23 (a). Therefore, the action will not be certified as a class action and any recovery will be limited to injuries sustained by the named plaintiff.

STATUTE OF LIMITATIONS

The complaint alleges that the illegal actions occurred in late 1972 and in the spring of 1973. This action was filed on May 11, 1977. The defendants argue that the action is barred by the statute of limitations.

This argument is clearly well taken as to the plaintiff's cause of action under 42 U.S.C. § 1986. The last sentence of that section provides that "no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued."

The plaintiff also brought the action under 42 U.S.C. §§ 1983 and 1985. Because a statute of limitation for these sections is not contained either in the Civil Rights Act or elsewhere in the federal statutes, the applicable period of limitation is that which Kentucky would enforce had an action seeking similar relief been brought in Kentucky state court. *Garner v. Stephens*, 460 F.2d 1144 (6th Cir. 1972). The question before the Court is, therefore, which Kentucky statute of limitations is appropriate for actions under §§ 1983 and 1985.

The plaintiff cites *Kentucky-Tenn. L&P. Co. v. Moats*, 290 Ky. 690, 162 S.W.2d 526 (1942), as authority that the five year statute of limitations applies to actions earned and unpaid. (§ 2515, Kentucky Statutes). However, KRS 413.120, which replaced §2515, contains no provision for an action on wages. In any event, such a suit would be considered an action on a contract and, inasmuch as there is not diversity of citizenship of the parties, this Court would have no jurisdiction to hear the case.

Defendants assert that the one year statute of limitations for conspiracy contained in KRS 413.140 (1) (c) is controlling. The Court finds that this statute does not bar the plaintiff's claim under 42 U.S.C. § 1985.

However, there remains plaintiff's claim under 42 U.S.C. §§ 1981 and 1983. The applicable Kentucky statute of limitations for this cause of action appears to be KRS 413.120 (2) :

The following actions shall be commenced within five years after the cause of action accrued:

(2) An action upon a liability created by statute, when no other time is fixed by the statute creating the liability.

Therefore, the defendants' motions to dismiss based on the fact that this action is barred by the statute of limitations will be sustained for the plaintiff's causes of action under 42 U.S.C. §§ 1985 and 1986, but overruled as to the plaintiff's claim under 42 U.S.C. §§ 1981 and 1983.

RES JUDICATA

On October 4, 1973, a civil rights action styled *Covington Housing Development Corp. and Eddie Thompson, Jr. v. City of Covington, et al.*, was filed in the United

States District Court, Eastern District of Kentucky as Covington, as civil action number 1752. Among the named defendants in that suit were June Hedrick and Joe Condit, defendants in the present action. The suit was brought pursuant to 42 U.S.C. §§ 1981 and 1983 and jurisdiction was invoked under 28 U.S.C. § 1343 (3). The corporation alternatively sought damages or reinstatement of the development, while plaintiff, Eddie Thompson, Jr., demanded remuneration for the defendants' racist hiring practices and defamatory allegations of fiscal irresponsibility.

On September 11, 1974, District Judge Mac Swinford, entered Summary Judgment in favor of the defendants based on the findings that (1) the corporation had no authority to bring the action, and (2) the plaintiff, Thompson, had no personal remedy for injuries suffered by the corporation and that the deprivations inflicted on the plaintiff individually were insufficient to justify retention of jurisdiction. 381 F.Supp. 427 (E.D. Ky. 1974), *aff'd by unpublished opinion*, 513 F.2d 630 (6th Cir. 1975).

The case was appealed to the Supreme Court, where the plaintiff's Writ of Certiorari was denied on October 6, 1975. 423 U.S. 869.

Defendants now assert that this action is barred by *res judicata*. Although the plaintiff argues that "whether the Director [Thompson] has any personal claim to be resolved by the court was not before the court when it ruled Summary Judgment for defendants against Covington Housing Development Corporation" (plaintiff's reply p. 3), the record, as indicated above, shows otherwise. Both Judge Swinford and the Appellate Court held that plaintiff Thompson, as an individual, suffered no deprivation of his civil rights.

It is a well settled principle that "*res judicata* may be pleaded as a bar, not only as respects matters actually pre-

sented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matters which might have been presented to that end.' [citations omitted]." *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378 (1940). See also *All States Investors, Inc. v. Sedley*, 399 F.2d 769 (6th Cir. 1968).

This principle was applied to a federal civil rights claim in *Scoggin v. Schrunk*, 522 F.2d 436 (9th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976). In *Scoggin*, the plaintiff first sued in state court in the theories of unjust enrichment and no timely notice of a foreclosure sale. After an unfavorable decision, Ms. Scoggin brought an action under 42 U.S.C. § 1983, seeking the same relief, but for the first time saying her civil rights had been violated by the sale of her property without notice. The District Court held that unless the civil rights claim had actually been tendered to the state court, *res judicata* did not apply. In reversing, the Ninth Circuit held:

It is now established that where the federal constitutional claim is based on the same asserted wrong as the subject of a state action, and where the parties are the same, *res judicata* will bar the federal constitutional claim whether it was asserted in state court or not, for the reason that the state judgment on the merits serves not only to bar every claim that was raised in state court, but also to preclude the assertion of every legal theory or ground for recovery that might have been raised in support of the granting of the desired relief.

Id. at 437.

The present case arises out of the same set of facts and involves the same parties as case number 1752. The Summary Judgment which was rendered by Judge Swinford in favor of the defendants goes to the merits of the case and

operates as an effective bar to this action. See *Brachett v. Universal Life Ins. Co.*, 519 F.2d 1072 (5th Cir. 1975); *Sopp v. Gehrlein*, 236 F.Supp. 823 (W.D. Pa. 1964).

An order in conformity with this Memorandum Opinion will be entered this date.

This 5 day of October, 1977.

/s/ EUGENE E. SILER, JR.,
JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

77-1716

EDDIE THOMPSON, JR.,
Plaintiff-Appellant,

vs.

COVINGTON HOUSING DEVELOPMENT,
Defendant,

JOSEPH CONDIT and JUNE HEDRICK,
Defendants-Appellees.

ORDER

(Filed September 18, 1978)

BEFORE: WEICK, CELEBREZZE and KEITH, Circuit
Judges.

This appeal, perfected from an order of the district court dismissing this civil rights action against only two of the three named defendants, has been assigned to a panel pursuant to Rule 9(a), Rules of the Sixth Circuit.

It appearing that there is no final appealable order and that this Court is without jurisdiction to consider the present appeal, *William B. Tanner Co., Inc. v. United States*, 575 F.2d 101 (6th Cir. 1978); *Moody v. Kapica*, 548 F.2d 133 (6th Cir. 1976),

It is ORDERED that the appeal be and it is hereby dismissed. Rule 9(b) (1), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN,
Clerk

Issued as Mandate: October 31, 1978

COSTS: NONE

[CERTIFICATION OMITTED]